Supreme Court, U.S.
FILED
MAY 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1590

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

NEW YORK STATE DEPARTMENT OF LABOR; THOMAS F. HARTNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,
Petitioners,

v.

GENERAL ELECTRIC COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF RESPONDENT GENERAL ELECTRIC COMPANY IN OPPOSITION

JAMES S. FRANK *
VIRGIL B. DAY
MARC S. WENGER
NEIL A. CAPOBIANCO
VEDDER, PRICE, KAUFMAN, KAMMHOLZ & DAY
One Dag Hammarskjold Plaza
New York, New York 10017
(212) 223-1892
Counsel for Respondent General Electric Company

May 11, 1990

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Are the provisions of the New York prevailing wage law which require that GE provide its employees with locally determined employee welfare and pension benefits preempted by ERISA?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
ADDITIONAL STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Fringe Benefits Regulated By New York's Prevailing Wage Law	2
B. GE Employee Benefit Plans	4
C. Department of Labor Enforcement	4
D. This Action—Motion for Preliminary Injunction	5
SUMMARY OF ARGUMENT	7
REASONS FOR DENYING THE WRIT	8
I. THERE ARE NO SPECIAL OR IMPORTANT REASONS TO GRANT CERTIORARI IN THIS CASE	8
II. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE MANDATED BENEFIT PROVISIONS OF NEW YORK'S PREVAILING WAGE LAW RELATE TO EMPLOYEE BENEFIT PLANS AND ARE PREEMPTED BY ERISA	11
A. Section 220 Undermines ERISA's Goal Of Promoting The Cost-Efficient Administration Of Uniform Benefits	11
B. Section 220 Regulates GE's Benefit Contribution Levels And Requires GE To Provide A Locally Determined Level Of Benefits	15

TABLE OF CONTENTS—Continued

Page

C. Section 220 Requires GE To Implement An Ongoing Administrative Scheme 19

D. The Department's Effort To Treat The Mandated Benefit Requirement Of Section 220 As A Wage Statute Is Contrary To The Statutory Definition Of "Supplements" 22

CONCLUSION 23

APPENDIX 1a

TABLE OF AUTHORITIES

Cases Page

Action Elec. Contractors Co. v. Goldin, 64 N.Y. 2d 213, 474 N.E.2d 601, 485 N.Y.S.2d 241 (1984) 3, 13, 16, 17
A.L. Blades & Sons, Inc. v. Roberts, 136 A.D.2d 926, 524 N.Y.S.2d 912 (4th Dep't), *appeal denied*, 72 N.Y.2d 803, 528 N.E.2d 520, 532 N.Y.S. 2d 368 (1988) 3, 13, 16-17
Alessi v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) 11, 13, 17, 21
Arcudi v. Stone & Webster Eng'g Corp., 463 U.S. 1220 (1983) 15
Atkin v. Kansas, 191 U.S. 207 (1903) 10
Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) 12, 13, 14, 19, 20, 21, 23
Gilbert v. Burlington Indus. Inc., 477 U.S. 901 (1986) 9, 22
Gilbert v. Burlington Indus. Inc., 765 F.2d 320 (2d Cir 1985), *aff'd mem.*, 477 U.S. 901 (1986) .. 9, 10, 23
Hewlett-Packard v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978) 15
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 10
Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Comm., 891 F.2d 719 (9th Cir. 1989) 8, 15
Local Union 598, Plumber & Pipefitters Indus. Journeymen & Apprentices Training Fund v. J.A. Jones Constr. Co., 109 S. Ct. 210 (1988) 7, 8, 15, 17, 19
Local Union 598, Plumber & Pipefitters Indus. Journeymen & Apprentices Training Fund v. J.A. Jones Constr. Co., 846 F.2d 1213 (9th Cir.), *aff'd mem.*, 109 S. Ct. 210 (1988) 8, 15, 18-19
Martori Bros. Distributors v. James-Massengale, 781 F.2d 1349 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986) 19-20

TABLE OF AUTHORITIES—Continued

	Page
Massachusetts v. Morash, 109 S. Ct. 1668 (1989)	22
Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)	11, 15, 16
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)	11, 12, 13, 16
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)	10, 11, 13, 15, 16, 20, 21
Stone & Webster Eng'g Corp. v. Ilsley, 518 F. Supp. 1297 (D. Conn. 1981), *aff'd*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983)	15
White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983)	10
Wisconsin Dep't of Indus., Labor and Human Relations v. Gould Inc., 475 U.S. 282 (1986)	10

Statutes, Rules, and Regulations

29 C.F.R. § 2510.3-1 (1987)	22
Davis-Bacon Act	
40 U.S.C.A. § 276a *et seq.* (West 1986)	21
Employee Retirement Income Security Act of 1974	
29 U.S.C.A. § 1002(1-3) (West Supp. 1990)	16, 22
29 U.S.C.A. § 1002(2)(A) (West Supp. 1990)	2
29 U.S.C.A. § 1002(3) (West Supp. 1990)	2
29 U.S.C.A. § 1144(a) (West 1985)	11, 17, 18
29 U.S.C.A. § 1144(c) (West 1985)	2, 17
29 U.S.C.A. § 1144(d) (West 1985)	21
N.Y. LAB. LAW	
§ 198-c (McKinney 1986)	2, 9, 22
§ 220 (McKinney 1986 & Supp. 1990)	*passim*
§ 220(3) (McKinney 1986)	2, 3
§ 220(3)-a(a) (McKinney 1986)	2, 20
§ 220(3)-a(c) (McKinney 1986)	2, 20
§ 220(5)(a) (McKinney 1986)	3
§ 220(5)(b) (McKinney Supp. 1990)	3, 22
§ 220(5)(c) (McKinney 1986)	3

TABLE OF AUTHORITIES—Continued

	Page
§ 220(5)(d) (McKinney 1986)	3, 18
§ 220(6) (McKinney 1986)	2, 20
§ 220(7) (McKinney 1986)	2, 20
§ 220(8) (McKinney Supp. 1990)	2, 4
§ 220(9) (McKinney 1986)	2
1897 N.Y. Laws ch. 415	3
N.Y. WORK. COMP. LAW §§ 200-242 (McKinney 1965 & Supp. 1990)	16
WASH. REV. CODE ANN. § 39.12.010 *et seq.* (1972)	19
Miscellaneous	
120 CONG. REC. 29197 (1974)	12
H.R. CONF. REP. No. 1280, 93rd Cong., 2d Sess. (1974)	12
N.Y. CONST. art. I, § 17	3
S. CONF. REP. No. 1090, 93rd Cong., 2d Sess. (1974)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1590

NEW YORK STATE DEPARTMENT OF LABOR; THOMAS F. HARTNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF RESPONDENT GENERAL ELECTRIC COMPANY IN OPPOSITION

General Electric Company ("GE") hereby opposes the petition for a writ of certiorari filed by the New York State Department of Labor ("Department").[1]

---

[1] Respondent General Electric Company has the following subsidiaries (other than wholly-owned subsidiaries) and affiliates, not including subsidiaries whose shares or debt securities are not publicly held: General Electric Capital Corporation; General Electric Credit Corporation; General Electric Credit International, N.V.; General Electric Overseas Capital Corporation; and RCA Corporation. The New York Apparatus Service Center, which performed the work involved in this action, is a corporate "subentity" of GE.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions reproduced in the Department's appendix at 37a-40a, further applicable statutory provisions are reproduced in the appendix annexed hereto.[2] The relevant federal statutory provisions also include §§ 3(2)(A), 3(3), and 514(c) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. §§ 1002(2)(A), 1002(3), and 1144(c) (West 1985 & Supp. 1990). The relevant New York State statutory provisions also include N.Y. LAB. LAW §§ 198-c, 220(3), 220(3)-a(a), 220(3)-a(c), 220(6), 220(7), 220(8), and 220(9) (McKinney 1986 & Supp. 1990).

STATEMENT OF THE CASE

ERISA heralded the emergence of a comprehensive and pervasive federal interest in uniform regulation and protection of employee benefit plans. When this interest was created in 1974, it necessarily required the displacement of state action in the field of private employee benefit plans. Thus, Congress' express desire to preempt all state laws left no room for traditional exercises of state power in this field, including the fringe benefit provisions of New York's prevailing wage law.

A. Fringe Benefits Regulated By New York's Prevailing Wage Law

Prior to the enactment of ERISA, the New York Legislature in 1956 amended the State's Prevailing Wage Law ("Section 220") to require for the first time that contractors provide prevailing fringe benefits to their employees as determined by the State Commissioner of Labor ("Commissioner"). The stated purpose of the 1956 amendment was to equalize the labor costs of public work

---

[2] References to petitioners' appendix are cited as "——a"; references to the Joint Appendix filed in the Court of Appeals are cited as "JA ——."

contractors and to have the Commissioner, not the contractor, determine the level of health and pension benefits to be provided employees (7a-8a).[3] *See Action Elec. Contractors Co. v. Goldin*, 64 N.Y.2d 213, 221-22, 474 N.E.2d 601, 604-05, 485 N.Y.S.2d 241, 244-45 (1984) ("*Action Electric*"); *A.L. Blades & Sons, Inc. v. Roberts*, 136 A.D.2d 926, 524 N.Y.S.2d 912 (4th Dep't), *appeal denied*, 72 N.Y.2d 803, 528 N.E.2d 520, 532 N.Y.S.2d 368 (1988) ("*A.L. Blades*"). For this purpose all fringe benefits were statutorily denominated "supplements," N.Y. LAB. LAW § 220(3) (McKinney 1986), which in turn were defined as "any payments which are *not 'wages'*." N.Y. LAB. LAW § 220(5)(b) (McKinney Supp. 1990) (emphasis added).

Section 220 measures supplements by their cost to the employer, not their "value to the employee" (8a), and an employer can satisfy its statutory obligation only by providing the locally prevailing benefits or by giving its employees the exact cash cost in lieu of the benefit. *Action Electric*, 64 N.Y.2d at 218, 474 N.E.2d at 602, 485 N.Y.S.2d at 242. Under 1983 amendments to Section 220, the determination was *de facto* given over to unions as the statute now mandates adoption of union wages and benefits for each locality (N.Y. LAB. LAW § 220(5)(a) (McKinney 1986) as well as adoption of the union definition of locality (N.Y. LAB. LAW § 220(5)(d) (McKinney 1986)).[4]

---

[3] Neither the historic objectives of the originally enacted prevailing wage law, 1897 N.Y. Laws ch. 415, nor the 1938 incorporation of the then existing statutory provisions into the state constitution, N.Y. CONST. art. I, § 17, are implicated by the Court of Appeals' decision herein.

[4] Since 1983, wages and supplements have been adopted directly from the collective bargaining agreements of employers employing at least 30% of the workers in a particular trade in the relevant locality. N.Y. LAB. LAW § 220(5)(a,c) (McKinney 1986).

B. GE Employee Benefit Plans

GE is a party to a collective bargaining agreement with Local 3 of the International Brotherhood of Electrical Workers ("Local 3"), which agreement establishes terms and conditions of employment and provides for an extensive package of employee fringe benefits provided through eleven nationally administered employee benefit plans (JA 4a-6a, 95a-96a, 104a-107a). GE's employee benefit plans are subject to ERISA and provide GE employees with substantial pension, disability, medical, training, and job and income security benefits. The benefits provided by the plans apply as equally as possible to all GE employees, regardless of the state or locality in which the employees are working (4a).

Pursuant to the provisions of GE's ERISA plans, GE, as administrator of the plans, uniformly administers and applies the terms and provisions of each plan to all participants therein throughout the United States (JA 105a-106a). Uniform administration reduces administrative costs and time delays and provides a greater level of benefits to participants for each dollar contributed to the plans (JA 105a-106a).

C. Department of Labor Enforcement

In January 1987, GE commenced transformer maintenance and repair work for the Long Island Rail Road ("LIRR") in Kings, Queens, Nassau, and Suffolk Counties pursuant to a public work contract (5a). On April 6, 1988, the Commissioner cited GE for violating Section 220 and, without a hearing, ordered the LIRR to withhold $241,117 in payments owed GE (5a-6a).[5] GE was

[5] GE's request for a hearing (*see* N.Y. LAB. LAW § 220(8) (McKinney Supp. 1990)) has not been granted by the Department. Subsequent to the initial withholding, the Department ordered an additional $435,001 withheld for allegedly unpaid supplements. After the Court of Appeals' decision and the District Court's February 1, 1990 direction to the Department to commence a hearing

held responsible for the difference between the cost of prevailing benefits and GE's cost for providing such benefits under its plans, plus interest and penalties (5a).[6] The benefits provided by the GE plans are "different from, and in some cases [cost] less than those which the state claims are due under Section 220" (5a). However, GE received no credit for its cost of providing benefits which were not deemed to be "prevailing benefits" by the Commissioner (5a).

In effect, the Department has determined that GE must modify its plans as well as its recordkeeping procedures solely with respect to employees assigned to work on public work projects, thus undermining the distinct advantages derived from standardized administration of employee benefit plans (JA 108a-109a). Section 220 requires GE, as plan administrator, to modify the plan's eligibility determinations, calculation of benefit levels, disbursements, monitoring of the availability of funds, recordkeeping, and reporting (JA 109a).

D. This Action—Motion for Preliminary Injunction

On July 22, 1988, GE moved for a preliminary injunction to restrain the state from enforcing the withholding notice, from prosecuting GE for its alleged violations, and from enforcing any of the provisions of Section 220 pending a prior hearing (6a; JA 1a-14a). The District Court denied GE's motion on the law holding that ERISA does

---

within 6 weeks, the Department, on March 2, 1990 agreed to release the $676,118 which had been withheld from GE upon GE's posting of a bond and agreement to defer the hearing pending review by this Court.

[6] On April 19, 1988, GE was served with a "Notice of Labor Law Investigation Findings" ("Notice") (JA 81a-86a) and ordered to pay the wages and supplements determined by the Commissioner, post on the job site all such wage and supplement rates, and maintain records showing the hours and days worked by each worker and the cost of supplements paid or provided (JA 82a). The Notice threatens GE with both civil and criminal penalties (JA 82a).

not preempt Section 220 (33a-35a). The Court of Appeals vacated and remanded, holding that the supplement provisions of Section 220 are preempted by ERISA (3a).[7]

This holding was based on the Court's finding that:

> Section 220 intrudes into [three] preempted areas. Ex-locality employers such as GE are required either to bring their pension and welfare plans into conformity with those prevailing in the locality (as the prevailing plans are determined to exist by a State fiscal officer on the basis of job classifications made by the Department of Labor) or to make up the difference through cash payments to their employees. The employer is required to keep, and on request to file with the State, sworn schedules of supplements and wages and to make its books and records pertaining to wages, supplements and hours of labor available for inspection by a State fiscal officer. In the event the employer fails to bring a plan into conformity with a similar plan prevailing in the locality, the employee may be required to accept cash payments based on what the employer's cost would have been to accomplish conformity, payments that may be of lesser value to the employee than the unpaid benefits would have been.

(10a-11a) (citations omitted).

The Court of Appeals also focused on the conflicting regulations imposed on GE by the differences between the New York regulatory philosophy and the congressional philosophy embodied in ERISA.

> The Supreme Court holds that under ERISA, "private parties, not the Government, control the level of benefits." The New York courts hold that under section 220, "the Commissioner of Labor, not the

---

[7] The Court of Appeals also remanded the issue of whether the 1983 amendments to Section 220 constitute an unlawful delegation of legislative power in violation of the due process clause (6a). The District Court is presently considering cross-motions for summary judgment on a supplemented record on this and other issues.

> contractor, determine[s] the supplements to be provided." These courts are adjudicating in the same area but reaching inconsistent results, and that is exactly what ERISA was designed to prevent.

(9a) (citations omitted).

SUMMARY OF ARGUMENT

The Court should deny the petition for certiorari because there are no special or important reasons for granting it and, in any event, the issue of ERISA preemption was correctly decided by the Court of Appeals. The issue of ERISA preemption of state prevailing wage laws which regulate contribution levels has recently been settled by this Court. *Local Union 598, Plumbers & Pipefitters Indus. Journeymen & Apprentices Training Fund v. J.A. Jones Constr. Co.*, 109 S. Ct. 210 (1988) ("*J.A. Jones*"). In relying on *J.A. Jones* and other applicable ERISA preemption decisions of this Court, the Court of Appeals correctly held that the supplement provisions of Section 220 relate to ERISA plans. As revealed by the legislative history, ERISA's sweeping preemption clause was intended to achieve cost-efficient administration of plans through uniform national regulation, a purpose that is fundamentally at odds with Section 220's goal of equalizing the costs of providing benefits. GE must also implement an ongoing administrative scheme to comply with Section 220 and keep benefit records in a different form and manner than those normally maintained by GE. Since New York's prevailing wage law prescribes the type and amount of an employer's benefit contributions, the rules under which the plan operates, and the nature and amount of benefits provided, it relates to employee benefit plans and is therefore preempted by ERISA.

REASONS FOR DENYING THE WRIT

I. THERE ARE NO SPECIAL OR IMPORTANT REASONS TO GRANT CERTIORARI IN THIS CASE

Rule 10.1 of the Rules of this Court provides that review on a writ of certiorari is a matter of judicial discretion which will only be granted for special and important reasons. In the instant case, no such reasons exist as the issue presented has already been settled by this Court. Contrary to the Department's assertion (Pet. 12), ERISA preemption of state prevailing wage laws is not a novel issue for the Court. *J.A. Jones*, 109 S. Ct. 210. In *J.A. Jones* this Court affirmed, without opinion, the decision of the Ninth Circuit Court of Appeals which held that the Washington State prevailing wage statute, that required employers to maintain a certain level of contributions to employee benefit plans, was preempted by ERISA. *Id.* The Department's mischaracterization of this Court's summary affirmance in *J.A. Jones* as a denial of certiorari (Pet. 12) leads it to incorrectly assert that "this Court has not yet addressed the viability of [prevailing wage] laws under ERISA's preemption provision" (Pet. 12). Since the issue has been settled by this Court in a way contrary to the position urged by the Department, the petition does not raise any issues warranting review.

Moreover, the Court of Appeals' holding—that the mandated supplement provisions of New York's prevailing wage law clearly relate to the ERISA plans of employers in GE's position and are therefore preempted by ERISA—coincides with decisions of the Ninth Circuit holding that prevailing wage laws that mandate a contribution level are preempted by ERISA. *See J.A. Jones*, 846 F.2d 1213 (9th Cir.), *aff'd mem.*, 109 S. Ct. 210 (1988); *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Appren'iceship Comm.*, 891 F.2d 719, 729 (9th Cir. 1989) ("*Hydrostorage*") ("[a] law purports to regulate a plan [and is therefore preempted]

if it attempts to reach in one way or another the terms and conditions of employee benefit plans").[8]

In addition, the Department's primary argument for overturning the Court of Appeals' decision, that Section 220 requires no more than the payment of the cash equivalent of the cost difference in benefits and is exempt from preemption as a payroll practice, is foreclosed by this Court's decision in *Gilbert v. Burlington Indus., Inc.*, 477 U.S. 901 (1986), *aff'g*, 765 F.2d 320 (2d Cir. 1985) ("*Gilbert*"), in which this Court summarily affirmed a Court of Appeals decision holding N.Y. LAB. LAW § 198-c (McKinney 1986) preempted by ERISA. *Gilbert*, 765 F.2d 320. The statute at issue in *Gilbert* provides that an employer who fails to pay the amount necessary to provide benefits or furnish "supplements" is guilty of a misdemeanor, N.Y. LAB. LAW § 198-c(1) (McKinney 1986), and defines supplements almost identically to Section 220. Given the parallelism between Section 198-c and Section 220, the Department's repeated reference to Section 220 supplements as a wage provision, notwithstanding the legislature's definition to the contrary (*i.e.*, non-wages), is no more than a disguised attempt to relitigate the preemption issue decided in *Gilbert*. Having determined that claims for "supplements" under Section 198-c are preempted by ERISA, it would be anomalous for this Court to now reject the state legislature's language and conclude that Section 220's supplement provisions are wage payment practices.

Despite the Supreme Court decisions settling these issues, the Department relies upon the state's asserted interest in prevailing wage laws as a reason for granting

---

[8] As both circuit courts that have had occasion to address ERISA preemption of state prevailing wage laws agree that state statutes aimed either at enforcing the terms of an ERISA plan or compelling nonsignatory employers to join or comply with such plans are preempted by ERISA, there is no conflict among the circuits within the meaning of Supreme Court Rule 10.1(a).

its petition (Pet. 9-11). In this regard, the Department's reliance on *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) ("*Hughes*"), and *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983), wherein commerce clause challenges to state proprietary activities were rejected, is misplaced because GE has not brought a commerce clause challenge. More importantly, what the commerce clause would permit New York to do in the absence of ERISA is an entirely different question from that posed herein. *Wisconsin Dep't of Indus., Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 290 (1986). Similarly, *Hughes* specifically held that "[n]othing in the purposes animating the Commerce Clause prohibits a State, *in the absence of congressional action*, from participating in the market and exercising the right to favor its own citizens over others." *Hughes*, 426 U.S. at 810 (emphasis added). Since here, there is a direct congressional mandate to preempt the type of state action exemplified by Section 220, pre-ERISA decisions are of no avail to the Department.[9]

The Department's invocation that "New York's prevailing wage law is an exercise of the State's traditional authority" (Pet. 14) fails to acknowledge that in order for preemption to be avoided, the exercise of state power "must also affect the plans 'in too tenuous, remote or peripheral a manner.'" *Gilbert*, 765 F.2d at 327 (*quoting Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)). Given Section 220's requirement that benefits be paid or provided in addition to those required by GE's collective bargaining agreement, the Department can hardly claim that Section 220 "has only a peripheral effect on benefit plans" (Pet. 14). Exercises of state authority are preempted if they relate to ERISA plans whether or not such authority is traditionally exercised

[9] To the extent that the Department also relies upon *Atkin v. Kansas*, 191 U.S. 207 (1903), that case upheld a state prevailing wage statute which did not require fringe benefits long before ERISA preemption was the law of the land.

by the state. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 736 (1985) ("*Metropolitan Life*").

Accordingly, there are no special or important reasons for granting the Department's petition for a writ of certiorari.

II. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE MANDATED BENEFIT PROVISIONS OF NEW YORK'S PREVAILING WAGE LAW RELATE TO EMPLOYEE BENEFIT PLANS AND ARE PREEMPTED BY ERISA

A. Section 220 Undermines ERISA's Goal Of Promoting The Cost-Efficient Administration Of Uniform Benefits

As this Court has recognized on numerous occasions, Section 514(a) of ERISA, 29 U.S.C.A. § 1144(a) (West 1985), was intended to have a sweeping preemptive effect in the employee benefit plan field because Congress intended ERISA to occupy and regulate the field. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) ("*Pilot Life*"); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98-100 (1983) ("*Shaw*").

In *Pilot Life*, this Court summarized its teachings on the scope of ERISA preemption as follows:

> [T]he express pre-emption provisions of ERISA are deliberately expansive, and designed to "establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 US 504, 523, 68 L Ed 2d 402, 101 S Ct 1895 (1981). As we explained in *Shaw v. Delta Air Lines, Inc.*, 463 US 85, 98, 77 L Ed 2d 490, 103 S Ct 2890 (1983):
>
> > "The bill that became ERISA originally contained a limited preemption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected those provisions in favor of the

> present language, and indicated that section's pre-emptive scope was as broad as its language. See HR Conf Rep No. 93-1280, p 383 (1974); S Conf Rep No. 93-1090, p 383 (1974)."

The House and Senate sponsors emphasized both the breadth and importance of the pre-emption provisions. Representative Dent described the "reservation to Federal authority the sole power to regulate the field of employee benefit plans" as ERISA's "crowning achievement." 120 Cong Rec 29197 (1974). Senator Williams said:

> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law."

Pilot Life, 481 U.S. at 45-46.

This Court has further stated that:

> It is thus clear that ERISA's preemption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patch-work scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987) ("*Fort Halifax*").[10]

---

[10] At the time of ERISA's passage, Representative Dent stated that "with the preemption of the field [of employee benefit plans],

The Court of Appeals' holding, that Section 220 falls within the class of state laws preempted by ERISA, is entirely consistent with and indeed mandated by this Court's teachings on the broad scope of ERISA preemption.

Relying on relevant Supreme Court precedent, the Court of Appeals found that Section 220 relates to ERISA plans in several respects. Initially, the Court of Appeals recognized the fundamental conflict between ERISA's goal of promoting the cost-efficient administration of employee benefit plans and Section 220's regulation of the cost of benefits:

> The Supreme Court holds that under ERISA, "private parties, not the Government, control the level of benefits." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981). The New York courts hold that under section 220, "the Commissioner of Labor, not the contractor, determine[s] the supplements to be provided." *A.L. Blades & Sons, Inc. v. Roberts, supra*, 136 A.D.2d at 927. These courts are adjudicating in the same area but reaching inconsistent results, and that is exactly what ERISA was designed to prevent. *See* statements of Senator Williams and Congressman Dent quoted in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987), and *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983).

(8a-9a). Thus, while ERISA aims to reduce the cost of administering employee benefit plans to enable employers to provide greater benefits, *Fort Halifax*, 482 U.S. at 12, Section 220's supplement provisions were designed to equalize labor costs to remove a perceived unfair advantage of contractors who had to pay less for fringe benefits. *Action Electric*, 64 N.Y.2d 213, 474 N.E.2d 601, 485 N.Y.S.2d 241.

---

we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." *Fort Halifax*, 482 U.S. at 9.

Having found that "Section 220 measures supplements by their cost to the employer, not their 'value to the employee'" (8a), the Court of Appeals recognized that the state statute operates primarily to increase the cost of providing benefits and is incompatible with ERISA. As an employer with employees in many states, the most efficient way for GE to provide benefits to those employees is to establish a uniform administrative scheme which provides a set of standard procedures to guide disbursement of benefits. *Fort Halifax*, 482 U.S. at 9. ERISA recognizes that the most cost-efficient way of providing benefits is through uniform national plans. Thus, GE has implemented the benefit programs which Congress sought to encourage. Section 220, on the other hand, requires daily recalculation of the benefits owed and thus undermines ERISA's purpose of encouraging the establishment of nationwide plans which provide benefits efficiently by permitting uniform administration. By mandating the costs to be borne by employers providing ERISA benefits, Section 220 frustrates ERISA's goal of promoting efficient administration of uniform benefits and discriminates against employers such as GE who are able to provide an extensive array of benefit plans at lower costs than small local plans.[11] In effect, the Department's Notice (JA 81a-86a) punishes GE for doing what ERISA was designed to encourage—providing more comprehensive benefits at lower cost. Essentially, Section 220 taxes away all of GE's cost savings achieved through nationally established and administered benefit plans. Accordingly, the Court of Appeals correctly held that the basic purposes of ERISA and the supplement provisions of Section 220 are fundamentally incompatible.

---

[11] Section 220 requires that the economic efficiencies achieved by GE through its uniform administration of the GE plans be forfeited for GE employees assigned to work on the LIRR project (JA 109a). This is inconsistent with the congressional goal of promoting standardized administration of employee benefit plans.

B. Section 220 Regulates GE's Benefit Contribution Levels And Requires GE To Provide A Locally Determined Level Of Benefits

In addition to demonstrating the fundamental conflict between the purposes of Section 220 and ERISA, the Court of Appeals found that Section 220 relates to ERISA plans in three prohibited areas: the statute prescribes the type and amount of an employer's contributions to a plan, the rules and regulations under which a plan operates, and the nature and amount of the benefits provided thereunder (10a).

State statutes regulating contributions to ERISA plans have consistently been held preempted. *J.A. Jones*, 109 S. Ct. 210 (1988); *Hydrostorage*, 891 F.2d at 129-130; *Stone & Webster Eng'g Corp. v. Ilsley*, 518 F. Supp. 1297, 1300-01 (D. Conn. 1981), *aff'd*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983) (*"Stone & Webster"*); *Hewlett-Packard v. Barnes*, 425 F. Supp. 1294, 1297-1300 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978) (*"Hewlett-Packard"*). In doing so, the courts have rejected the contention that various state laws relating only to the level of contributions to an ERISA plan, rather than to the composition or administration of benefits, are not subject to preemption. *J.A. Jones*, 846 F.2d at 1218-1219; *Stone & Webster*, 518 F. Supp. at 1301; *Hewlett-Packard*, 425 F. Supp. at 1297-1300. Thus, if a state statute is designed to increase either an "employer's negotiated obligations" or "the cost which is to be borne by the employer," the statute is preempted by ERISA. *Stone & Webster*, 518 F. Supp. at 1301.

In urging that Section 220 is not preempted, the Department has overlooked precedent from this Court holding that state laws relate to employee benefit plans if they mandate benefits of the type ERISA covers. *Metropolitan Life*, 471 U.S. at 739; *Shaw*, 463 U.S. at 97.

In this case, the Department seeks to hold GE liable under Section 220 because of insufficient expenditures for pension, health/welfare, apprenticeship training, annuity, vacation, holiday, and dental benefits (JA 81a-86a). These types of benefits are expressly covered by ERISA, 29 U.S.C.A. § 1002(1-3) (West Supp. 1990), and may not be regulated by the states. *Pilot Life*, 481 U.S. at 47-48. Since none of the ERISA exemptions (*e.g.*, laws which regulate insurance, *cf. Metropolitan Life*, 471 U.S. 724) apply in this case, Section 220's relation to employee benefit plans required the Court of Appeals' holding that the statute was preempted by ERISA.

Similarly the Department has ignored this Court's finding in *Shaw*, 463 U.S. 85, that the provisions of New York's Disability Benefits Law, N.Y. WORK. COMP. LAW §§ 200-242 (McKinney 1965 & Supp. 1990), which required employers to pay specific benefits to employees, clearly related to benefit plans. *Id.* at 97.[12] Here Section 220 relates to employee benefit plans because it requires employers to provide specific ongoing benefits to employees.

While the New York Court of Appeals has interpreted Section 220 to allow employers the option of satisfying their Section 220 obligations by paying the "cash equivalent" of a supplement, the court did not modify the statutory obligation that an employer provide fringe benefits based on prevailing practices in a locality. *Action Electric*, 64 N.Y.2d 213, 474 N.E.2d 601, 485 N.Y.S.2d 241. In any event, the cash equivalent option increases costs for providing certain plan benefits and requires all contractors to comply with a particular level of contributions set by the Department for a locality based on the state legislature's intent to impose fixed cost levels for providing benefits to employees. *A.L. Blades*, 136 A.D.2d

---

[12] While ERISA's exemption of state disability insurance laws saved the statute in *Shaw* from preemption, ERISA contains no exemption designed to save Section 220 from preemption.

926, 524 N.Y.S.2d 912. The cash equivalent option is merely an enforcement tool which does not affect the underlying obligation to provide health, welfare, and pension benefits on a locality by locality basis. Here the problem was extreme. Since the LIRR work was performed in two adjacent localities, GE had varying obligations to provide varying benefits each day it performed work on the project (JA 123a-125a). Even if the cash equivalent option were viewed as an indirect regulation of contribution levels to employee benefit plans, it would nevertheless run afoul of ERISA's broad preemption clause. 29 U.S.C.A. § 1144(c)(2) (West 1985). As this Court observed in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) ("*Alessi*"):

> It is of no moment that [the state] intrudes indirectly, through a workers' compensation law rather than directly, through a statute called "pension regulation." ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern . . . . *ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the pre-emption provision.*

Id. at 525 (emphasis added).

While the cash equivalent option, added by judicial interpretation in *Action Electric* over the objection of the Department, was not part of the Washington prevailing wage law at issue in *J.A. Jones*, the essential issue is the same: whether state laws which require equivalence between benefits provided by national ERISA plans and locally prevailing benefits relate to those ERISA plans. The option of providing a variable, added payment directly to employees does not take Section 220 out of the scope of the congressional intent to leave ERISA plans totally free from state regulation. 29 U.S.C.A.

§ 1144(a) (West 1985). Otherwise every local jurisdiction could require employers to pay locally prevailing benefits and the congressional goal of freeing employers who maintain ERISA plans from inconsistent state and local regulation would be frustrated.

The State's imposition of daily and recurring added costs to providing benefits is one evil that Section 514(a) was enacted to proscribe. The magnitude of the evils to uniform plan administration caused by the Section 220 locality comparisons can not be overstated. Simply put, they completely frustrate the congressional purpose of encouraging the establishment of uniform national benefit plans. If ERISA does not preempt the supplement provisions of Section 220, every county in the state, or the nation for that matter, could assess a different cost to interstate ERISA plans based on local practice. To make matters worse, the scope of the "locality" under Section 220 is not determined by the state, but rather by unions who engage in collective bargaining. N.Y. LAB. LAW § 220(5)(d) (McKinney 1986).

Clearly Congress did not intend to allow this type of state interference with benefit plans. Section 514(a) was enacted with the broad "relates to" test to preclude local regulation of ERISA plans. If Section 220 is not preempted, any tax, fee, or obligation imposed on plan contributions or benefits mandated by a state—if payable in cash by the employer maintaining an ERISA plan—would be outside the scope of Section 514(a) preemption.

Since Section 220 mandates the provision of a locally determined level of employee benefits or their cost equivalent, it relates to GE's ERISA plans and is a type of regulation that is indistinguishable from the Washington statute which also mandated a locally determined level of employer contributions to an ERISA plan. *J.A. Jones,*

846 F.2d at 1214. The mechanism by which an added payment is exacted is not the issue. Rather, it is the intrusion by the state into the level of contributions which is prohibited. Since the State has taken the position that GE has not spent enough on its benefit plans, Section 220 "relates to" GE's employee benefit plans.

Thus the Department's attempt to require GE to provide additional benefits is no more justified than the pension fund's claim in *J.A. Jones* for additional monies for the added value of prevailing benefits. *Compare* N.Y. LAB. LAW § 220 (McKinney 1986 & Supp. 1990) *with* WASH. REV. CODE ANN. § 39.12.010 *et seq.* (1972).

C. Section 220 Requires GE To Implement An Ongoing Administrative Scheme

Section 220 requires considerably more administration than a one-time, lump-sum payment triggered by a single event. *Cf. Fort Halifax*, 482 U.S. at 12. It requires GE to implement an ongoing administrative program to monitor and record the cost of benefits provided to employees in order to determine whether additional benefits or payments are required on any given workday for the supplements included on the prevailing wage schedule for each work site (JA 82a). When a worker is transferred from one locality to another, GE must recalculate the difference between its benefit costs and the cost of the prevailing supplements (JA 123a-125a).

As the Court of Appeals stated:

> there is not even unity as between Nassau/Suffolk Counties on the one hand and Kings/Queens Counties on the other. Moreover, GE cannot eliminate the differences by single cash payments, as in *Fort Halifax Packing Co. v. Coyne*, *supra*, 482 U.S. at 12; *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1358 (9th Cir.), *cert. denied*, 479 U.S.

949 (1986); it is required to make continuous calculations, adjustments and payments.

(9a).[13]

To comply with Section 220 and the Department's Notice herein, GE must establish an ongoing administrative scheme to determine whether a particular worker is employed on the LIRR project, the amount of supplements provided, the occupations of the workers, and their hours of employment (JA 82a). In addition the plans must keep records on the number of hours worked by each employee on the project for the week. They also have to make regular disbursements to employees and keep appropriate records to comply with the statute.[14] *See Fort Halifax*, 482 U.S. at 9. Since GE must adopt financial coordination and control mechanisms to meet Section 220's periodic demands, Section 220 directly affects administration of GE's employee benefit plans. *Id.* at 12. ERISA's comprehensive preemption of state law was meant to preclude this sort of interference with the administration of employee benefit plans so that employers would not have to administer their plans differently in

---

[13] Even if the requirements of Section 220 were uniform throughout the state, GE would still be subject to different contribution requirements in different states (Pet. 10 n.7). Obligating an employer to satisfy a wide variety of state prevailing wage laws makes administration of a nationwide plan more difficult. *Shaw*, 463 U.S. at 105 n.25.

[14] The Department's portrayal of the recordkeeping requirements (N.Y. LAB. LAW §§ 220(3)-a(a, c), (6), (7) (McKinney 1986)) as *de minimis* is inconsistent with its citation of GE for violating such requirements (JA 81a-82a). Section 220 requires GE to keep records in a different form and manner from those normally maintained by GE (JA 108a). A state law requiring an employer to keep records of its benefit plans clearly "relates to" those plans. Thus the recordkeeping requirement by itself is sufficient to warrant preemption as Congress intended that benefit administrators be required to comply only with federal recordkeeping provisions. *Fort Halifax*, 482 U.S. at 9.

each state in which they have employees. *Fort Halifax*, 482 U.S. at 10.[15]

The Department's assertion that Section 220 "mirror[s] similar federal requirements embodied in such laws as the Davis-Bacon Act, 40 U.S.C.A. § 276a *et seq.*" (Pet. 10) is of no avail. First, Section 220 is not a mirror of Davis-Bacon. More importantly, Davis-Bacon is a *federal* statute and ERISA does not preempt federal statutes. 29 U.S.C.A. § 1144(d) (West 1985).[16] The desirability of uniform administration of national plans would be severely undercut by the need to comply with a patchwork of conflicting state prevailing wage laws. By establishing benefit plan regulation as exclusively a federal concern, Congress intentionally "minimized the need for interstate employers to administer their plans differently in each State in which they have employees." *Shaw*, 463 U.S. at 105.

Section 220 requires GE to accommodate conflicting regulatory schemes by devising and operating inefficient local systems for providing employee benefits. *Alessi*, 451 U.S. 504.[17] This was precisely the burden that ERISA preemption was intended to avoid. *Fort Halifax*, 482 U.S. at 10.

---

[15] As this Court has previously recognized, this type of situation produces considerable inefficiencies which an employer might choose to offset by lowering benefit levels or eliminating benefits not required by any state. *Fort Halifax*, 482 U.S. at 13; *Shaw*, 463 U.S. at 105 n.25.

[16] While Section 514(d) of ERISA may operate to exempt from preemption those provisions of state laws upon which federal laws depend for their enforcement, *Shaw*, 463 U.S. at 104, Davis-Bacon does not depend on New York's prevailing wage law for its enforcement.

[17] As in *Alessi*, where this Court struck down a New Jersey statute that prohibited offsetting worker compensation payments against pension benefits, Section 220 prohibits GE from substituting one form of supplement for another since the Department ignores the costs which GE expends on benefits which are not deemed to be prevailing (5a).

D. The Department's Effort To Treat The Mandated Benefit Requirement Of Section 220 As A Wage Statute Is Contrary To The Statutory Definition Of "Supplements"

Recognizing that state regulation of employee benefits is prohibited (Pet. 14), the Department strains to depict Section 220's regulation of contractors' benefit costs as a wage provision. Relying on *Massachusetts v. Morash*, 109 S. Ct. 1668 (1989) ("*Morash*"), the Department asserts that "[t]he cash payments required by the prevailing wage law are functionally identical to vacation pay, holiday pay, premium pay or any other typical wage payment" (Pet. 15). The Department neglects to mention, however, that the payments required by Section 220 in this case involved contribution levels for pension, health/welfare, apprenticeship training, annuity, dental, and like benefits (JA 83a-86a, 123a-125a). Such benefits are expressly covered by ERISA. 29 U.S.C.A. § 1002(1-3) (West Supp. 1990); 29 C.F.R. § 2510.3-1(a)(2) (1987).

While the Department asserts that the payments required by Section 220 are "functionally identical" to wage payments (Pet. 15), Section 220 itself defines "supplements" as "any payments which are not 'wages.'" N.Y. LAB. LAW § 220(5)(b) (McKinney Supp. 1990). In contrast, the Massachusetts statute at issue in *Morash* specifically stated that "[t]he word 'wages' shall include any holiday or vacation payments. . . ." *Morash*, 109 S. Ct. at 1670 n.1. Since supplements under Section 220 are not wages, wages are not involved on this appeal.[18]

---

[18] GE's providing of fringe benefits to its employees does not constitute a payroll practice under 29 C.F.R. § 2510.3-1(b). Payroll practices cover overtime and shift premiums as well as payments of compensation out of an employer's general assets during periods the employee does not perform his or her employment duties. 29 C.F.R. § 2510.3-1(b) (1987). As noted above, to conclude otherwise would conflict with this Court's decision in *Gilbert*, 477 U.S. 901, that N.Y. LAB. LAW § 198-c (McKinney 1986), which defines supplements in the same fashion as Section 220, was preempted by ERISA.

Contrary to what the Department seems to be urging, ERISA preemption does not depend on whether an employer's fringe benefit plans are funded or unfunded. *Fort Halifax*, 482 U.S. at 17-18; *Gilbert*, 765 F.2d 320. ERISA protects employee expectations of benefits even when such benefits are paid out of general assets. *Fort Halifax*, 482 U.S. at 18. Whether the funds to pay a benefit come from a trust fund or from the company's general assets, the funds must be provided through an ongoing administrative scheme. As far as ERISA is concerned, there is no difference between providing benefits directly to the employee out of general assets and providing benefits out of general assets to a trust fund which pays it to the employee, as long as an ongoing administrative scheme is required.

CONCLUSION

For all the foregoing reasons, respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

JAMES S. FRANK *
VIRGIL B. DAY
MARC S. WENGER
NEIL A. CAPOBIANCO
VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & DAY
One Dag Hammarskjold Plaza
New York, New York 10017
(212) 223-1892
Counsel for Respondent
General Electric Company

May 11, 1990

* Counsel of Record

APPENDIX

APPENDIX

ADDITIONAL RELEVANT STATUTORY PROVISIONS

Section 3(2)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. § 1002(2)(A) (West Supp. 1990), provides:

> § 1002. Definitions
>
> For purposes of this subchapter:
>
> (2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
>
> > (i) provides retirement income to employees, or
> >
> > (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Section 3(3) of ERISA, 29 U.S.C.A. § 1002(3) (West Supp. 1990), provides:

> § 1002. Definitions
>
> For purposes of this subchapter:
>
> (3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both

an employee welfare benefit plan and an employee pension benefit plan.

Section 514(c) of ERISA, 29 U.S.C.A. § 1144(c) (West 1985), provides in relevant part:

> § 1144. Other laws
>
> (c) Definitions
>
> For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. * * *
>
> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Section 198-c of New York Labor Law (McKinney 1986) provides:

> 1. In addition to any other penalty or punishment otherwise prescribed by law, any employer who is party to an agreement to pay or provide benefits or wage supplements to employees or to a third party or fund for the benefit of employees and who fails, neglects or refuses to pay the amount or amounts necessary to provide such benefits or furnish such supplements within thirty days after such payments are required to be made, shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in section one hundred ninety-eight-a of this article. Where such employer is a corporation, the president, secretary, treasurer or officers exercising corresponding functions shall each be guilty of a misdemeanor.
>
> 2. As used in this section, the term "benefits or wage supplements" includes, but is not limited to, reimbursement for expenses; health, welfare and retire-

ment benefits; and vacation, separation or holiday pay.

Section 220(3) (second undesignated paragraph) of New York Labor Law (McKinney 1986) provides in relevant part:

> The supplements, as hereinafter defined, to be provided to laborers, workmen or mechanics upon such public works, shall be in accordance with the prevailing practices in the locality, as hereinafter defined. Serving laborers, helpers, assistants and apprentices * * * shall be provided supplements in accordance with the prevailing practices as hereinafter defined. * * * The supplements, as hereinafter defined, to be provided to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall be in accordance with the prevailing practices in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used. Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work, shall be provided the supplements as required in this article.

Section 220(3) (fourth undesignated paragraph) of New York Labor Law (McKinney 1986) provides:

> Any person or corporation that wilfully pays or provides after entering into such contract, less than such stipulated wage scale or supplements as established by the fiscal officer shall be guilty of a misdemeanor and upon conviction shall be punished for such first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days, or both fine and imprisonment; for a second offense by a fine of one thousand dollars, and in addition thereto the contract on which the violation has oc-

curred shall be forfeited; and no such person or corporation shall be entitled to receive any sum nor shall any officer, agent or employee of the state, municipal corporation or commission or board appointed pursuant to law pay the same or authorize its payment from the funds under his charge or control to any person or corporation for work done upon any contract, on which the contractor has been convicted for second offense in violation of the provisions of this section.

Section 220(3)-a(a) of New York Labor Law (McKinney 1986) provides in relevant part:

> * * * it shall be the duty of the fiscal officer * * * to make a determination of the schedules of wages and supplements to be paid or provided, as the case may be, therefor. The contractor and every subcontractor on public works contracts shall post in a prominent and accessible place on the site of the work a legible statement of all wage rates and supplements as specified in the contract to be paid or provided, as the case may be, for the various classes of mechanics, workingmen, or laborers employed on the work. The contractor and every sub-contractor shall keep original payrolls or transcripts thereof, subscribed and affirmed by him as true under the penalties of perjury, showing the hours and days worked by each workman, laborer or mechanic, the occupation at which he worked, the hourly wage rate paid and the supplements paid or provided, on the site of the work where the contractor or subcontractor maintains no regular place of business in New York state and where the amount of the contract is in excess of twenty-five thousand dollars. All other contractors or sub-contractors shall produce within five days on the site of the work and upon formal order of the commissioner or his designated representative such original payrolls or tran-

scripts thereof, subscribed and affirmed by him as true under the penalties of perjury, as may be deemed necessary to adequately enforce the provisions of this article. The original payrolls or transcripts shall be preserved for three years from the date of completion of the work on the awarded contract. * * *

Section 220(3)-a(c) of New York Labor Law (McKinney 1986) provides:

> The fiscal officer may require any person or corporation performing such public work to file with the fiscal officer within ten days of receipt of said request, payroll records, sworn to as to their validity and accuracy, requested by the fiscal officer, for said public work or any public or private work performed by said person or corporation during the same period of time as said public work. In the event said person or corporation fails to provide the requested information within the allotted ten days, the fiscal officer shall, within fifteen days, order the department of jurisdiction to immediately withhold from payment to said person or corporation up to twenty-five percent of the amount, not to exceed one hundred thousand dollars, to be paid to said person or corporation under the terms of the contract pursuant to which said public work is being performed. Said amount withheld shall be immediately released upon receipt by the department of jurisdiction of a notice from the fiscal officer indicating that the request for records had been satisfied.

Section 220(6) of New York Labor Law (McKinney 1986) provides:

> The fiscal officer, may, and on the written request of any interested person shall, require any person or corporation performing such public work to file with such fiscal officer schedules of the supplements to be

provided and wages to be paid to such laborers, workmen or mechanics. Any such person or corporation shall, within ten days after the receipt of written notice of such requirement, file with the fiscal officer such schedules of wages and supplements. An employer may contest a determination by the fiscal officer under paragraphs a and c of subdivision five of this section. The employer must allege and prove by competent evidence, that the actual percentage of workers, laborers or mechanics is below the required thirty per centum and during the pendency of any such contest and until final determination thereof, the work in question shall proceed under the rate established by the fiscal officer.

Section 220(7) of New York Labor Law (McKinney 1986) provides:

Compliance investigations. The fiscal officer as herein defined shall on a verified complaint in writing of any person interested or of any employee organization pursuant to subdivision eight-d, and may on his own initiative cause a compliance investigation to be made to determine whether the contractor or a subcontractor has paid the prevailing rate of wages and prevailing practices for supplements in the same trade or occupation in the locality within the state where such public work is being performed, or the hours of labor performed by the workmen, laborers and mechanics employed on such public work, or both. The fiscal officer or his agents, examiners and inspectors may examine or cause to be examined the books and records pertaining to the rate of wages paid and supplements provided to the laborers, workmen and mechanics on said public work and the hours of labor performed by such laborers, workmen and mechanics on said public work. The fiscal officer in such investigation shall be deemed to be acting in a judicial capacity, and shall have the right to

issue subpoenas, administer oaths and examine witnesses. The enforcement of a subpoena issued under this section shall be regulated by the civil practice law and rules. Such fiscal officer shall make an order or determination not later than six months after the filing of such verified complaint.

Section 220(8) of New York Labor Law (McKinney Supp. 1990) provides in relevant part:

> Hearings. Before issuing an order or determination as provided in subdivision seven, the fiscal officer shall order a hearing thereon at a time and place to be specified, and shall give notice thereof, together with a copy of such complaint or the purpose thereof, or a statement of the facts disclosed upon such investigation, which notice shall be served personally or by mail on any person or corporation affected thereby; such person or corporation shall have an opportunity to be heard in respect to the matters complained of at the time and place specified in such notice, which time shall be not less than five days from the service of the notice personally or by mail. * * * Such hearing shall be expeditiously conducted and upon such hearing the fiscal officer shall determine the issues raised thereon and shall make and file an order in the office of the fiscal officer stating such determination, and forthwith serve a copy of such order, with a notice of the filing thereof, upon the parties to such proceeding, personally or by mail. Such order shall direct payment of wages or supplements found to be due, including interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of the payment, provided, however, that such interest rate shall not apply to subdivision eight-c of this section.

> In addition to directing payment of wages or supplements including interest found to be due, such order may direct payment of a further sum as a civil penalty in an amount not exceeding twenty-five percent of the total amount found to be due. In assessing the amount of the penalty, due consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and the failure to comply with recordkeeping or other non-wage requirements. * * *

Section 220(9) of the New York Labor Law (McKinney 1986) provides:

> When a final determination has been rendered, any person, or corporation that wilfully refuses thereafter to pay the rate of wages or to provide the supplements determined to be prevailing, or wilfully employs on such public work, laborers, workmen or mechanics more than the hours per day determined by said order until modified by order of the fiscal officer or court and thereby violates the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be punished, for a first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment; for a second offense by a fine of one thousand dollars, and in addition thereto the contract on which the violation has occurred shall be forfeited; and no such person or corporation shall be entitled to receive any sum nor shall any officer, agent or employee of the state or of a municipal corporation pay the same or authorize its payment from the funds under his charge or control to any such person or corporation for work done upon any contract, on which the contractor has been convicted of second offense in violation of the provisions of this section.